

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HALIMA SHEILR DAHIR

Claimant

V.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

Docket No. 1,061,274

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 13, 2014, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on March 20, 2015. Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Carolyn McCarthy of Kansas City, Missouri, appeared for self-insured respondent.

The ALJ found claimant sustained a 7 percent permanent partial disability to the body as a whole as a result of an accidental injury arising out of and in the course of her employment with respondent on December 13, 2011. The ALJ determined claimant is entitled to unauthorized medical not to exceed \$500, though claimant is not entitled to future medical treatment. The ALJ also found claimant was not entitled to temporary total disability (TTD) compensation from April 12, 2013, through July 19, 2013.

The Board has considered the record and adopted the stipulations listed in the Award.¹

ISSUES

Claimant argues she has proven a 17 percent impairment to the body as a whole related to her injury of December 13, 2011. Further, claimant contends she is entitled to TTD benefits in the amount of \$4,572.54 for the period of April 12, 2013, to July 19, 2013, because she was sent home with no pay while respondent could not accommodate her restrictions. Claimant also received medical treatment for her injury during this period. Claimant requests the right to review and modify and the right to future medical treatment.

¹ The stipulations include an agreement by the parties that the reports of Drs. Baughman, Murati, and Pratt could be admitted into the record without further foundation.

Respondent maintains the ALJ's Award should be affirmed. Alternatively, respondent argues all compensation should be denied on the basis claimant failed to prove by a preponderance of credible evidence she suffered accidental injuries arising out of and in the course of her employment with respondent. Respondent contends claimant failed to prove that it is more probable than not future medical treatment will be required and failed to provide evidence in support of unauthorized medical treatment. Respondent also argues because claimant's inability to work during the period of April 12, 2013, through July 19, 2013, was due to permanent restrictions, claimant is not entitled to TTD benefits.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to TTD benefits for the period of April 12, 2013, through July 19, 2013?
3. Is claimant entitled to future medical treatment?
4. Is claimant entitled to unauthorized medical treatment?

FINDINGS OF FACT

Claimant testified she sustained three accidents in the course of her employment with respondent. Claimant testified about all three accidents during the regular hearing of August 4, 2014. Claimant required a Somali translator.

Claimant's accident of December 13, 2011, is the subject of Docket No. 1,061,274. Claimant testified she slipped in some fat on the floor and fell, injuring her low back and right knee. Claimant described current, constant pain in the low back through the buttocks that also extends into the legs and the upper back. She stated her condition worsens with sitting, twisting, turning, and bending. Claimant also described constant, current pain in both knees, with the right knee worse than the left.

Claimant was initially represented by the Mann Law Offices, LLC, who filed a claim on her behalf alleging an injury to the head on December 13, 2011, due to a fall at work. Claimant's current counsel filed an amended claim on May 9, 2014, noting injuries to claimant's right knee, bilateral hips, and low back due to a slip and fall.

The ALJ noted in her Award:

The claimant's amended E-1 alleges she slipped on fat and sustained injury to her right knee, both hips and her low back. From the histories in the medical records and the claimant's testimony, it is unclear what happened and when but the claimant relates all her conditions to her work activities. The respondent stipulated

that the claimant met with personal injury by accident arising out of and in the course of her employment on December 13th, 2011.²

Claimant was provided treatment by respondent. Claimant was given permanent restrictions on April 12, 2013, limiting her use of a knife, scissors, or hook. On April 12, 2013, Mitch Young, respondent's human resources manager, informed claimant her restrictions could not be accommodated. Claimant testified she was told by Mr. Young to stay home without pay until a position became available. Claimant stated Mr. Young told her she had not been terminated.

Mr. Young testified respondent will find a light duty or restricted position for an employee with temporary restrictions until such time the employee either has permanent restrictions or recovers from his or her injuries. Mr. Young explained it is not respondent's practice to modify existing jobs for an employee with permanent restrictions. Instead, Mr. Young will assist an employee with permanent restrictions in finding an open position within the restrictions. Mr. Young stated an employee with permanent restrictions may check for bid jobs on a weekly basis. If a position within the restrictions becomes available, Mr. Young will assign the position. Mr. Young testified claimant was aware of respondent's policy, and it was her responsibility to apply for alternate positions with respondent.

A position fitting claimant's permanent restrictions eventually became available, and claimant returned to work for respondent on July 19, 2013. Claimant did not work during the period of April 12, 2013, through July 19, 2013. Claimant testified she continued to undergo medical treatment during this period. Claimant continues to work for respondent.

Dr. Michael J. Baughman provided an impairment rating on August 29, 2012. Dr. Baughman noted claimant had reached a static point in the orthopedic management of multiple musculoskeletal complaints, including her low back, right knee, and right shoulder. Dr. Baughman listed normal physical findings and normal x-rays of claimant's low back, including an expected degree of degenerative disk disease of the lumbar spine commensurate with claimant's age. Using the *AMA Guides*,³ Dr. Baughman determined claimant falls into DRE Category II and assessed a 5 percent impairment to the whole body.

Dr. Baughman noted claimant has "demonstrable osteoarthritis of her knee, particularly the patellofemoral joint with joint space narrowing."⁴ Dr. Baughman indicated claimant sustained a combined impairment of 15 percent to the body as a whole, though

² ALJ Award (Nov. 13, 2014) at 5.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁴ Baughman Report (Aug. 29, 2012) at 1.

he opined at least one-half of claimant's impairment is preexisting, with the other half due to a work-related aggravation of the preexisting condition.

Dr. Baughman assigned permanent restrictions for claimant and noted claimant's "condition is unlikely to improve or deteriorate in any predictable way with further time, prescription medication, supervised physical therapy or surgical intervention."⁵ Claimant was released from Dr. Baughman's care.

On June 26, 2013, Dr. Pedro A. Murati examined claimant at claimant's counsel's request. Claimant complained to Dr. Murati of headaches with difficulty seeing; low back pain into both legs, worse on the right; pain in the bilateral shoulders going into the neck and upper back; pain in the bilateral elbows, hands, and all fingers; right knee and ankle pain; and difficulty sleeping due to all over body pain. After reviewing claimant's available history, medical records, and performing a physical examination, Dr. Murati listed the following impressions: bilateral carpal tunnel syndrome, left medial and lateral epicondylitis, myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, various lower extremity neuropathies, low back sprain, bilateral SI dysfunction, right medial collateral sprain with meniscal problems, right patellofemoral syndrome, right high ankle sprain, right plantar fasciitis, and metatarsalgia of the right second and third metatarsals.⁶ Dr. Murati provided permanent restrictions and recommended claimant follow up with a physician on an annual basis. Dr. Murati noted claimant's diagnoses were within all reasonable medical probability a direct result from the work-related injuries sustained while working for respondent.

Using the *AMA Guides*, Dr. Murati opined claimant sustained a combined 17 percent impairment to the body as a whole related to her right lower extremity and lumbosacral areas. Dr. Murati wrote:

For the loss of sensation of the peroneal distribution, using table 68, this claimant receives 3% lower extremity impairment. For the loss of sensation of the distal saphaneous, using table 68, this claimant receives 3% lower extremity impairment. For the loss of sensation of the sural distribution, using table 68, this claimant receives 2% lower extremity impairment. For the decrease in sensation along the medial plantar cutaneous, using table 68, this claimant receives 3% lower extremity impairment. For the right patellofemoral syndrome, using table 62, this claimant receives 5% right lower extremity impairment. For the medial collateral ligament sprain, using table 64, this claimant receives 7% lower extremity impairment. For the loss of range of motion of the right ankle, using tables 42 and 43, the claimant receives 2% right lower extremity impairment. For the right plantar fasciitis, using the Pain Chapter, this claimant receives 5% right lower extremity impairment. For the metatarsalgia of the 2nd metatarsal, using table 64, the claimant receives 2%

⁵ *Id.*

⁶ See Murati Report (June 26, 2013) at 5-6.

right lower extremity impairment. For the metatarsalgia of the 3rd metatarsal, using table 64, the claimant receives 2% right lower extremity impairment. These impairments combine for 29% right lower extremity impairment, which converts for 12% whole person impairment. . . . For the low back pain secondary to lumbar sprain, this claimant is placed in Lumbosacral DRE Category II for 5% whole person impairment.⁷

Dr. Terrance Pratt provided a court-ordered Independent Medical Evaluation (IME) of claimant on December 10, 2013. Dr. Pratt noted claimant was “only a fair historian with details but relates all of her symptoms to vocationally related activities.”⁸ Dr. Pratt reviewed claimant’s available history, medical records, and performed a physical examination. He determined claimant has chronic head discomfort, history of cervicothoracic syndrome, low back pain with degenerative disk disease, history of bilateral shoulder and hand discomfort, and right knee discomfort with degenerative joint disease. Dr. Pratt provided permanent restrictions, but he did not address future medical treatment.

The ALJ noted that although Dr. Pratt did not specifically combine his impairment ratings in his IME, his impairments related to claimant’s right lower extremity and lumbosacral spine combine to a 7 percent impairment to the body as a whole according to the *AMA Guides*. Using the *AMA Guides*, Dr. Pratt determined:

In relationship to [claimant’s] right knee involvement, she had preexisting degenerative changes with tricompartmental involvement as well as a degenerative lateral meniscus tear. Based on the records available for consideration, she had a vocationally related contusion right knee that work was the prevailing factor for. The degenerative changes which were identified, were preexisting and unrelated to the reported vocationally related event.

For her lumbosacral involvement, she has degenerative disease but had a vocationally related lumbosacral sprain/strain. The degenerative changes are unrelated to her work activities.

. . . .

She does have permanent partial impairment for the right knee contusion. Utilizing table 62, page 3/83, that would be equivalent to 5% of the extremity, equivalent to 2% of the whole person. Range of motion is significantly limited and there were pain limitations. I could not state to any reasonable degree of medical certainty that she has permanency for the knee in excess of that in direct relationship to the reported vocationally related event. For the lumbosacral involvement, utilizing page

⁷ *Id.* at 6-7.

⁸ Pratt IME (Dec. 10, 2013) at 1.

3/102, I would consider her involvement to result in DRE category II involvement vocationally related or 5% permanency of the whole person.⁹

Dr. Pratt submitted an addendum to his December IME on June 27, 2014. Dr. Pratt was provided three tasks and asked to consider them in association with the restrictions he provided claimant in his IME. Dr. Pratt opined claimant could no longer perform 1 of the 3 tasks, resulting in a task loss of 33 percent.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-510e(a) states, in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

(1) Weekly compensation for temporary partial general disability shall be 66 ⅔% of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto.

...

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 2011 Supp. 44-510c(b)(2)(A) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary restrictions for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, provided that if there is an authorized treating physician, such

⁹ *Id.* at 5-6.

physician's opinion regarding the employee's work status shall be presumed to be determinative.

K.S.A. 2011 Supp. 44-525(a) states, in part:

No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury.

K.S.A. 2011 Supp. 44-510h(b)(2) states:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

K.S.A. 2011 Supp. 44-510h(e) states:

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications

ANALYSIS

Respondent argues claimant failed to prove she suffered an injury arising out of her employment. Respondent, during the recitation of stipulations at the regular hearing, admitted claimant suffered an injury by accident on the date alleged and told the ALJ,

“[r]espondent makes all admissions.”¹⁰ As such, respondent has waived this defense, and this issue will not be considered by the Board.

1. What is the nature and extent of claimant’s disability?

Claimant filed an Amended Application for Hearing on May 9, 2014, alleging injuries to her right knee, both hips and low back on or about December 13, 2011. The parties filed a formal stipulation that the reports of Drs. Murati, Baughman and Pratt could be admitted into the record without further foundation.

Dr. Baughman opined claimant suffered a 5 percent impairment to the low back for degenerative disk disease. He assessed a 20 percent impairment to the right knee for osteoarthritis. Dr. Baughman did not assess impairment for claimant’s hips. Dr. Baughman combined the impairments for a total of 15 percent to the whole body. He wrote at least 50 percent of the 15 percent was due to preexisting osteoarthritis and degenerative disk disease. Dr. Baughman’s total impairment assessed as a result of claimant’s December 13, 2011, work-related accident is 7.5 percent to the whole body.

Claimant made no complaints of injury to her right foot or ankle at the regular hearing. Claimant also did not include her right foot or ankle in her amended application for hearing, which was filed two and one-half years after her injury by accident. Notwithstanding the absence of foot and ankle involvement, Dr. Murati assessed impairment for numerous foot and ankle conditions, including loss of sensation of the peroneal distribution, loss of sensation of the distal saphaneous, loss of sensation of the sural distribution, decrease in sensation along the medial plantar cutaneous, loss of range of motion of the right ankle, right plantar fasciitis, metatarsalgia of the 2nd metatarsal, and metatarsalgia of the 3rd metatarsal. Impairments related to these conditions are considered not relevant to this claim.

Of the numerous conditions rated by Dr. Murati, the conditions that could be identified with this docketed claim include 5 percent to the right lower extremity for patellofemoral syndrome and 7 percent to the right lower extremity for medial collateral ligament sprain. Utilizing the Combined Values Chart contained in the *AMA Guides*, the two lower extremity ratings combine for a 12 percent impairment to the right lower extremity, which equals a 5 percent whole body impairment.¹¹ The other relevant assessment of impairment provided by Dr Murati is 5 percent to the whole body for lumbar strain. Utilizing the Combined Value Chart found in the *AMA Guides*, these two impairments combine for a 10 percent permanent partial impairment to the body as a whole.

¹⁰ R.H. Trans. at 4.

¹¹ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) at 3/75, Sec. 3.2.

Dr. Pratt assessed an impairment rating of 5 percent of the whole body. Dr. Pratt opined claimant suffered a 5 percent impairment to the right lower extremity for the knee injury, which converts to a 2 percent impairment to the whole body. The two impairment ratings combine to equal a 7 percent impairment to the whole body. Averaging the three opinions, claimant suffers an 8.17 percent impairment to the whole person as the result of her work-related accident.

2. Is claimant entitled to TTD benefits for the period of April 12, 2013, through July 19, 2013?

In order to qualify for TTD pursuant to K.S.A. 2011 Supp. 44-510c(b)(2)(A), an employee must be rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. In this case, claimant's restrictions were permanent. Claimant is not entitled to TTD compensation for the time period requested.

3. Is claimant entitled to future medical treatment?

Dr. Baughman indicated claimant would not benefit, nor would her condition deteriorate, with future prescription medications, physical therapy or surgical intervention. Dr. Pratt's report did not contain an opinion related to the need for future medical care. Dr. Murati recommended annual follow up for claimant's lower back and right knee. Giving equal weight to the opinions of Drs. Baughman and Murati, the Board finds it is equally probable that claimant will or will not require future medical treatment.

4. Is claimant entitled to unauthorized medical treatment?

Claimant requested unauthorized medical, if it had not been used. No evidence of a claim for past unauthorized medical was presented at the regular hearing. As claimant has failed to meet the burden of proving entitlement to future medical treatment, it logically follows that she would not be entitled to future unauthorized medical pursuant to K.S.A. 2011 Supp. 44-510h(b)(2).

CONCLUSION

Claimant suffers an 8.17 percent impairment to the whole person as the result of her work-related accident. Claimant is not entitled to TTD compensation for the time period requested. Claimant has failed to prove it is more probable than not future medical treatment will be required as a result of her work-related injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 13, 2014, is affirmed, in part, and modified, in part, to reflect an 8.17 percent impairment to the whole body.

The claimant is entitled to 33.91 weeks of permanent partial disability compensation at the rate of \$311.09 per week, or \$10,549.06, for an 8.17 percent functional impairment, making a total award of \$10,549.06. As of April 17, 2015, all amounts are due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge